

BAIL SLIP

Appellant in CrI.A.413 of 2012(Single Accused Viz., Selvam @ Nenjan in S.C.No.131 of 2008 dated 16.08.2011 on the file of the Principal Sessions Judge, Salem) was released on Bail as per Order of this Court dated 30.07.2012 in M.P.No.1 of 2012 in CrI.A.413 of 2012.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 17.02.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

AND

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

CrI.A.No.413 of 2012

Selvam @ Nenjan ... Appellant/Single Accused

Vs.

The State,
rep.by its Inspector of Police,
Tholasampatti Police Station,
Salem District ... Respondent/Complainant
(Crime No.190 of 2003)

Criminal appeal preferred under Section 374(2) Cr.P.C.,
against the judgement dated 16.08.2011 passed by the Principal
Sessions Judge, Salem in S.C.No.131 of 2008.

For Appellant : Mr.Jayepakash,
for Mr.A.Esakkappan

For Respondent : Mr.M.Maharaja,
Additional Public Prosecutor

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JUDGMENT

(Judgement of the Court was delivered by S.Nagamuthu,J.)

The appellant is the sole accused in Sessions Case No.131 of 2008, on the file of the Principal Sessions Judge, Salem. He stood charged for the offence under Sections 302 and 201 r/w. Section 302 of the Indian Penal Code. By judgement dated 18.08.2011, the trial Court convicted him under both charges and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default, to undergo rigorous imprisonment for three months for the offence under Section

302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.500/-, in default to undergo rigorous imprisonment for one month for the offence under Section 201 read with 302 of the Indian Penal Code. Challenging the said conviction and sentences, the appellant is before this Court with this appeal.

2. The case of the prosecution in brief is as follows:

(a) The deceased in this case was a female child aged hardly 4 1/2 years, known as Chitra @ Tamilselvi. P.Ws.1 to 3 are the father, mother and grandfather respectively of the deceased. P.Ws.1 and 2 along with the deceased were living at Rettypatty Kolkaranvalaivu, in Selam District. P.W.3 was also a resident of the same village and his house was situated few yards away from the house of P.Ws.1 and 2. On 23.12.2003, in the evening, P.Ws.1 and 2 along with the deceased had gone to the house of P.W.3 for watching Television. After seeing T.V., P.Ws.1 and 2 left the house of P.W.3 by around 7.30 p.m. When P.Ws.1 and 2 were watching T.V., the deceased was playing in front of the house of P.W.3. The accused was also in the house of P.W.3, watching T.V. After P.Ws.1 and 2 had left the house of P.W.3 for their house, the accused came out of the house. He was then residing in a house, which was situated by the side of the house. The accused was climbing up on the stairs of the house of P.W.3. The deceased, who was playing, followed him and she called the accused as 'Nenjan'. 'Nenjan', in vernacular language, is a word used to ridicule somebody. When he reached the first floor of the house, the deceased also followed through the steps and reached the first floor. The accused got provoked by the said words of the child, namely, the deceased, and so, he gave a slap on the back of the child. Unfortunately, the child lost her balance and started rolling down on the steps. At last, the child fell down on the floor. The accused rushed there and found that the child was in a serious condition.

(b) According to the further case of the prosecution, since the child was unconscious, out of fear, he strangled the child to death, put the dead body in a gunny bag, tied it and then he took the gunny bag to the field of one Mr.Kullappan of the same village and then threw the same into the well. Then the accused fled away from the scene of occurrence, after removing some of the belongings of the deceased.

(c) P.Ws.1 and 2, who returned to their house by about 7.30 p.m., on 23.12.2003, went for sleep, believing that the child would stay at the house of P.W.3. P.W.3 was under the impression that the deceased child had gone along with P.Ws.1 and 2 to their house.

(d) On 24.12.2003, early in the morning, by about 5.00 a.m., P.W.1 went to the house of P.W.3 to take the child. But the child was not seen. P.W.1 and other family members went in search of the child and finally on 25.12.2003, at 9.30

a.m., P.W.1 made a complaint at Tholasampatti Police Station. P.W.11, the then Sub-Inspector of Police of Tholampatti Police Station, on receiving the complaint (Vide Ex.P1), registered a case in Crime No.190 of 2003, for girl-missing. Ex.P12 is the First Information Report. He forwarded Ex.P1, the complaint, to the Court and took up the case for investigation.

(e) At 10.30 a.m., on the same day, P.W.11 examined many witnesses and also prepared an observation mahazar at the place where the child was lastly playing and also prepared a rough sketch. But the child could not be traced.

(f) While so, on 26.12.2003, at 7.30 a.m, when P.W.5, the then Village Administrative Officer of Periyeripatty Village was in his office, the accused appeared before him and wanted to confess. He told him that since the police could harass him in the event he surrenders before the Police, he chose to appear before the Village Administrative Officer, namely, P.W.5. P.W.5 reduced to writing the said confession statement given by the accused (vide Ex.P2). In that confession, he admitted his guilt that he killed the deceased, put the dead body in a gunny bag and threw the same into the well, belonging to one Kullappan. Until such confession was made, the fact that the dead body was lying in the well was not known to anybody. P.W.5, immediately took the accused to the police station and produced him before the Sub-Inspector of Police along with Ex.P2 (extra judicial confession) and a report prepared by him (vide Ex.P3).

(g) P.W.13, the Inspector of Police took up the case for investigation, arrested the accused at 10.15 a.m. on 26.12.2003 in the presence of P.W.5 and another witness. The accused again confessed to P.W.13 and disclosed the place where he had thrown the dead body of the deceased and also disclosed the place where he had hidden the jetty and waist-card made of silver. In pursuance of the same, he took P.W.13, P.W.5 and another witness to the well of one Kullappan. There was water in the well which was so transparent. It could be seen that there was a gunny bag at the bottom of the well. P.W.13 then made arrangements for lifting the gunny bag from out of the well. P.W.6, a villager, climbed down into the well, dived into the water and brought the gunny bag out.

(h) In the meanwhile, P.W.13 had sent intimation to P.Ws.1 to 3 about the same. P.Ws.1 to 3 had also come to the well. When the gunny bag was opened, it was found that the dead body of the deceased was inside.

(i) In pursuance of the said disclosure statement, the accused took P.W.13 and the witnesses to the field of one Ellappan and from a bush, he produced the jetty (M.O.1). It is stated that on 26.12.2003, P.W.13 produced the accused before the Executive Magistrate-cum-Tahsildar, Omalur. It is also stated that the accused gave a voluntary confession to him and the same was reduced to writing. Ex.P20 is the said statement. Then, P.W.13 brought the accused to the Court and

sent him for judicial remand. Then, he conducted inquest on the body of the deceased and then forwarded the same for postmortem. P.W.12 conducted autopsy on the body of the deceased on 26.12.2013 at 4.30 p.m. He found the following injuries:

"1) A transverse complete ligature mark present over the neck, 15 c.m. 3 c.m. The base of the ligature is reddish, hyoid bone his in tact. Thyroid cartilage is fractured - (Ante mortem fracture) 2) A contusion present on R shoulder 4.2 c.m.; L shoulder 3.1 c.m.; R side of back, on the upper part 5.3 c.m.; R side of chest 6.3. c.m. (The above injuries are ante mortem in nature) Other Findings - Pleural cavity - empty Peritoneal cavity - empty, Heart - empty, Early decomposed. Lungs - congested, and oedematous, Early decomposed, liver, spleen, kidneys - congested, early decomposed, Stomach-20 ml of greyish yellow chyme present. No smell, Mucosa - decomposed and congested. Bladder - empty. Spinal column and cord - Intact. Scalp, bones, membranes - Intact, Brain - softened. Uterus - small size, cavity - empty. Finger Nails - Bluish, conjunctiva - intensely congested."

Ex.P15 is the post-mortem certificate. The Doctor gave opinion that the deceased had died of asphyxia due to ligature strangulation and the death would have occurred 60 to 65 hours prior to postmortem examination. The material objects were sent for chemical examination, which reveal that there was human blood on both bangles and synthetic bag. On completing the investigation, P.W.13 laid charge sheet against the accused.

3. Based on the above materials, the trial Court framed charges under Sections 302 and 201 r/w. Section 302 of the Indian Penal Code. Since the accused denied the same, to prove the case, on the side of the prosecution as many as 13 witnesses were examined, 27 documents and 11 materials objects were marked. Out of the said witnesses, P.Ws.1 to 3 have stated about the missing of the child from 7.30 p.m. on 23.12.2003 onwards from the house of P.W.3. They have further stated that they identified the dead body on 26.2.2003, after the dead body was lifted out from the well. They have also identified the personal belongings of the deceased. P.W.4 is a person belonging to the same village. He has stated that on 23.12.2003, at about 10.30 p.m., when he was passing through the fields, he found that in darkness somebody was moving.

Then he flashed the torch light and found that it was the accused, carrying a gunny bag. When P.W.4 enquired, the accused told that it was paddy bag and he was taking the same to Tholasampatty rice mill. This happened somewhere near the place where the dead body was found. P.W.5, the Village Administrative Officer, has spoken about the extra judicial confession given by the accused; the discovery of the dead body from the well; the recovery of personal belongings of the deceased and the disclosure statement made by the accused. P.W.6 has stated that on the instructions of the Inspector of Police, he lifted the body out from the well. P.W.7 has spoken about the observation mahazar and the rough sketch prepared at the place of occurrence. P.W.10 has spoken about the photographs taken on the dead body of the deceased. P.W.12 has spoken about the autopsy conducted and his final opinion regarding the cause of death. P.W.11 has spoken about the registration of the case on the complaint of P.W.1 and P.W.13 has spoken about the investigation done and the final report filed.

4. When the above incriminating materials were put to the accused, he denied the same as false. However, he did not choose to examine any witness on his side nor mark any document. Having considered all the above, the trial Court convicted the accused under both charges as detailed in first paragraph of this judgement and that is how the accused is before this Court.

5. We have heard the learned counsel for the appellant and also the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

6. This is a case based on circumstantial evidence. The first and foremost circumstance relied on by the prosecution is that the deceased was lastly seen alive on 23.12.2003 at about 7.30 p.m. near the house of P.W.3. P.Ws.1 to 3 have spoken elaborately about the same. We do not find any reason to reject the evidence of P.Ws.1 to 3. Thus, it has been clearly established that the deceased was lastly seen alive near the house of P.W.3 at 7.30 p.m., on 23.12.2003. The presence of the accused at the same time at the house of P.W.3 and that he left for his house at 7.30 p.m., after watching T.V.programme also has been proved by the evidence of P.W.1 to P.W.3.

7. The child was not seen either on 24.12.2003 or on 25.12.2003. P.W.1 made a complaint to the police on 25.12.2003. Though investigation was commenced by P.W.11 and he examined many witnesses, the whereabouts of the child was not known. This circumstance has also been clearly established by the prosecution.

8. The evidence of P.W.5 relates to one of the important circumstances in the case. P.W.5, the Village Administrative Officer, has stated that on 26.12.2003, at about 7.30 a.m., the accused came and gave a voluntary confession, which was reduced to writing under Ex.P2. The learned counsel for the appellant would submit that the said confession cannot be believed and the same is to be rejected. The contention of the learned counsel is that P.W.5 is a stranger to the accused and thus, the accused would not have chosen him to confess. We find some force in the said argument. But at the same time, on that score we find it difficult to reject the evidence of P.W.5 for it is on this information of the accused, the dead body was discovered from the well. If there was no discovery of any fact, out of the confession, then accepting the argument of the learned counsel for the appellant that the accused would not have chosen a stranger to confess, we may doubt the evidence of P.W.5. But the said doubt is obviated by the fact that the dead body was discovered from the well only out of his confession. Until he disclosed to P.W.5 that he had put the dead body in a gunny bag and had thrown the same into the well, the fact that the child was dead and the body was in the well was not known to anybody. Thus, this is a very strong circumstance against the accused. The accused has got no explanation to offer as to how he came to have knowledge that the dead body, in a gunny bag, was in the well, if really he had not thrown the same into the well. In the absence of any such explanation, as provided under Section 114 of the Indian Evidence Act, we have to presume that the accused was the one, who threw the gunny bag containing the dead body of the deceased into the well. Ofcourse, this presumption is rebuttable. But the accused has failed to rebut the presumption, instead the prosecution has proved other circumstances to corroborate this very strong circumstance against the accused.

9. Immediately after recording Ex.P2, P.W.5 produced the accused, along with Ex.P2 and a report under Ex.P3, to the Inspector of Police. To the Inspector of Police, again the accused confessed. In the said confession, he disclosed the fact that the dead body of the child had been thrown into the well. The trial Court has relied on this part of the statement as though it is admissible under Section 27 of the Indian Evidence Act. In our considered view, this part of the statement is not admissible in evidence for in Ex.P2 itself, the accused had disclosed that the dead body was put in a gunny bag and thrown into the well. Therefore, we eschew Ex.P4 from consideration so far as it relates to the disclosure of the place where the dead body had been thrown. At the same time, in the said confession to the Inspector of Police, he had disclosed the place where he had hidden the jetty and the waist-card of the deceased. In pursuance of the

same, they were discovered. This part of the information is certainly relevant under Section 27 of the Indian Evidence Act. The discovery of these belongings of the deceased, on the disclosure statement made by the accused, further strengthens the extra judicial confession earlier given to P.W.5.

10. After this exercise, P.W.13 had produced the accused before the Taluk Executive Magistrate, for recording his confession. Accordingly, one Pakianathan, the then Tahsildar recorded the confession of the accused between 8.00 p.m. to 10.00 p.m., on 26.12.2003. Though Mr.Packiarah has not been examined, the said confession of the accused had been marked as Ex.P20 through P.W.13.

11. First of all we are unable to understand as to how the contents of Ex.P20 would stand proved in the absence of examination of Mr.Packianathan, who recorded the same. Though the attempt of the prosecutor to mark Ex.P20 through P.W.13 was opposed by the learned defence counsel, the trial Court had marked it, however, subject to objection. But, in the judgement, the trial Court has relied on the same as though it is admissible in evidence and that it had been proved. In our considered view Ex.P20 is liable to be rejected for more than one reason. First of all, any confession made by the accused, while in custody of the police, unless the same is made in the immediate presence of a Judicial Magistrate, as provided under Section 26 of the Indian Evidence Act, is not relevant and the same is hit by Section 25 of the Indian Evidence Act. Here, Mr.Packianathan, who recorded Ex.P.20, is not a Judicial Magistrate. Secondly, the contents of Ex.P20 cannot stand proved unless Mr.Packianathan is examined. Assuming that Mr.Packianathan has been examined, even then, we are bound to reject Ex.P20 as it is not at all admissible in evidence. Therefore, the same is rejected.

12. After the body was recovered from the well, P.W.12 conducted autopsy on the body of the deceased. He has given opinion that there was a ligature mark on the neck of the deceased and he has given the opinion that the death was due to ligature strangulation. A perusal of the postmortem certificate and the oral evidence of P.W.12 would convince us that the death in this case was caused only by ligature strangulation. The fact that the body was in the gunny bag and the gunny bag remained tied would all go to show that the deceased was killed by ligature strangulation, the body was put in a gunny bag, the gunny bag was tied and then it was thrown into the well. From these circumstances, it has been clearly established that it is a clear case of culpable homicide. From the other circumstances, which we have already discussed elaborately, the prosecution has clearly proved that the culpable homicide of a deceased was committed only by the

accused and none else. There are no other circumstances, making out a hypothesis, which would be inconsistent with the innocence of the accused. Therefore, we hold that it was this accused and this accused alone who caused the death of the deceased by means of ligature strangulation, put the body in a gunny bag and threw the same into the well.

13. The learned counsel for the appellant would however submit that in Ex.P2-confession, the accused has stated that when he gave a slap on the back of the child, the child rolled down and became unconscious. He would further point out that thereafter, fearing for some action at the hands of the family members of the deceased, he took the child, put it in the gunny bag and threw the same into the well. He would further point out that there is no admission in the confession that he strangled the deceased. Thus, according to him, the extra judicial confession, is not corroborated by the medical evidence, he contended.

14. We find no force in this argument at all. In the confession the accused has admitted that he only killed the deceased and threw the dead body into the well by putting the dead body in the gunny bag. It is true that he has not stated that he strangled the neck of the child by means of ligature. In our considered view, the suppression of this fact by the accused in the confession might be either due to inadvertence or wanton. That will not be a ground to reject the entire confession. As we have already pointed out, the very fact that the dead body was discovered from a well, only out of his confession, would go to clinchingly prove that the appellant was the perpetrator of the crime.

15. Now the question is as to what was the offence that was committed by the accused, by his above act. The learned counsel would submit that the act of the accused would not amount to murder and therefore, he could be punished only under Section 304(2) of the Indian Penal Code. We do not find any point to agree with the learned counsel. From the facts narrated in the confession of the accused (Ex.P2), it is inferable that the accused had no pre-meditation to kill the deceased. He was very friendly with the family members of the deceased and therefore, he would not have had any motive at all to kill the deceased. As stated in the confession, the accused had given a slap on the back of the child, the child lost her balance and rolled down. Eventually the child had become unconscious. Until then, the accused had no intention to cause the death of the deceased. As stated in the confession, he would have been frightened that he would be questioned by the family members of the deceased. Had it been the case that thereafter believing that the child was no more, if he had thrown the dead body into the well, it may be doubtful as to whether his act would amount to culpable

homicide at all. But here in this case, though initially he had no intention to kill the deceased, from the medical evidence it is clear that he had strangled the deceased by means of ligature and then only he had thrown the dead body into the well. The strangulation of the child by means of a ligature surely, would go to prove the intention of the accused. The intention of the accused would have been only to ensure that the child died. But for this intention, he would not have used the ligature to strangle the child. Thus, though initially he had no intention to kill the child, at the time when he used the ligature to strangle the deceased, his intention was only to cause the death of the deceased. Thus, the act of the accused in strangulating the deceased to cause her death would bring the act of the accused within the first limb of Section 300 of the Indian Penal Code. From the medical evidence, it is clear that the death was not due to drowning and it was only due to strangulation. Thus, it is crystal clear that only after causing the death of the child and only after having ascertained that there was no life in the body, he had thrown the body into the well with a view to cause disappearance of the evidence. Thus, the act of the accused would squarely fall within the first limb of Section 300 of the Indian Penal Code. The learned counsel for the appellant would submit that the act of the accused would fall within the first exception to Section 300 of the Indian Penal Code. It is the contention of the learned counsel that out of fear the accused had thrown the body into the well and thus, the act of the accused would fall within the definition of grave and sudden provocation, as enshrined in the first exception to Section 300 of the Indian Penal Code. We do not agree with this argument. We do agree that the provocation, which is so grave and sudden, for the purpose of exception one to Section 300 of the Indian Penal Code, need not necessarily be by means of words, but it can even be by means of the deeds. But the pre-requisite is that such provocation should have emanated from the deceased. Here in this case, the deceased had not done anything to provoke the accused after she had fallen down from the stairs. Thus, in our considered view, the act of the accused would not fall within the first exception to Section 300 of the Indian Penal Code. In view of the said position, we hold that the act of the accused in causing the death of the deceased amounts to murder and therefore, he is liable to be punished under section 302 of the Indian Penal Code. For having thrown the dead body in a gunny bag into the well, the accused had caused disappearance of the evidence and thus, he is liable to be punished under Section 201 r/w. Section 302 of the Indian Penal Code. Thus, we hold that the trial Court is right in convicting the accused under both charges.

16. Now turning to the quantum of punishment, the trial Court has imposed only the minimum punishment, which also does

not call for any interference at the hands of this Court.
Thus, we do not find any merit at all in this appeal.

17. In the result, the appeal fails and the same is dismissed. The conviction and sentence passed by the trial Court is hereby confirmed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

msk

To

- 1.The District Munsif Cum
Judicial Magistrate,
Omalur.
- 2.Do The Chief Judicial Magistrate,
Salem.
- 3.The Additional Sessions Judge,
Salem.
- 4.The Principal Sessions Judge,
Salem.
- 5.The Inspector of Police,
Tholasampatti Police Station,
Salem District.
- 6.The Superintendent,
Central Jail, Coimbatore.
- 7.The District Collector,
Salem.
- 8.The Director General of Police,
Mylapore, Chennai.
- 9.The Public Prosecutor,
High Court, Madras.

+lcc to Mr.A.Esakkiappan, Advocate, S.R.No.10329

Cr1.A.No.413 of 2012

TEJ(CO)
CA(10/03/2016)